MAT DAUD AHMAD & ANOR.

v.

MALAYSIA BRITISH ASSURANCE SDN. BHD.

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[CIVIL SUIT NO. 24-175-87]
9 SEPTEMBER 1990

CIVIL PROCEDURE: *Application to strike out defence - No reasonable cause of action - Scandalous, frivolous or vexatious - Plain and obvious cases - Inherent jurisdiction of Court - Discretionary - Real question already determined - Identical issues - Order 18 r. 19 of Rules of High Court 1980.*

In August 1982 the 1st plaintiff M, as administrator of I (deceased) claimed damages for the benefit of I's defendants and also I's estate against D1 and D2, the 1st and 2nd defendants (the original suit). The 2nd plaintiff R also sued D1 and D2 for personal injuries. The case involved an accident between I who was riding a motorcycle with R as pillion rider and a motorvan driven by D1; D2 being alleged to be the owner of the van. The plaintiffs application for summary judgment was dismissed on 18 June 1984.

D2 applied for an order that he be struck out as party to the suit as at the material time D2 averred that he was no longer the owner of the van; this application was dismissed.

On the hearing date of 26 January 1986, the defendants raised as a preliminary objection same issue as was dismissed earlier. This objection was dismissed; the same point was pursued again by the defence and the Court held that D2 was liable as he was the registered owner on record. The defendant's appeal to the Supreme Court was dismissed.

The Court's award was not settled and the plaintiffs then filed the present suit against the insurer MBA pursuant to s. 80(1) of the Road Traffic Ordinance 1958 (the Ordinance); MBA alleged that they were not on risk as D2 had sold the van. The defence sought leave to issue a third party notice to Motor Insurers Bureau of West Malaysia for satisfaction of the judgment sum obtained against D2 in the original suit. This was struck out on 21 January 1988 due to defendant's Counsel's failure to attend Court; an application for reinstatement has been filed but not yet heard.

In January 1988, the plaintiffs filed an application under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) for striking out of the defence and this application was granted by the Senior Assistant Registrar. The defendants hence appealed, relying on the Federal Court case of *Loh Holdings*.

Held:

[1] Whenever it appears to the Court that the real question to be determined had already been determined by a Court of competent jurisdiction, the Court is not unjustified in dismissing the second action as being frivolous and vexatious or an abuse of its process.

[2] In this case the same point had been canvassed three times before 2 different Judges and the point was rejected by them after considering the arguments advanced by defence Counsel; the statements of defence was rightly struck out as being frivolous and vexatious or an abuse of the Court's process.

[3] It would appear that it had long been decided that it would be tantamount to an abuse of the process of the Court for a litigant to file an action over an identical question which had already been decided against him even though the matter was not strictly *res judicata* - see *Stephenson v. Garrett*.

[Appeal dismissed.]

Cases referred to:
Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. v. Anor [1984] 1 CLJ (Rep) 211
Roslan bin Abdullah v. New Zealand Insurance Co. Ltd. [1981] 2 MLJ 324
Nanyang Insurance Co. Ltd. v. Salbiah & Anor. [1967] 1 MLJ 94
Tractors Malaysia Bhd. v. Tio Chee Hing [1975] 2 MLJ 1
Stephenson v. Garrett [1898] 1 QB 677

Legislation referred to:
Road Traffic Ordinance 1958, s. 80(1)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiffs - Wan Mustapha; M/s. Wan Mustapha & Co.
For the defendants - Jagjit Singh; M/s. Jagjit Singh & Co.

JUDGMENT

Idris Yusoff J:

In August 1982 a suit was filed and registered as CS 113/82 (the original suit) by the 1st plaintiff Mat Daud bin Ahmad as "administrator of Ilias bin Mat Daud, deceased" claiming damages for the benefit of the deceased's dependent and also for the deceased's estate against Mohamed bin Mat Hassan and Yaacob bin Ismail, the 1st and 2nd defendants respectively in the said suit. Jointly suing the two defendants was the 2nd plaintiff, Ramli bin Mat Daud for personal injuries.

The statement of claim showed on 22 August 1979 Ilias bin Mat Daud, deceased was riding a motorcycle with 2nd plaintiff as pillion rider when they collided with a motor van driven by 1st defendant. It was also alleged that the 2nd defendant was the registered owner of the motor van at the material time. The allegation of negligence was resisted by the defence though there was an admission of ownership of the motor van by the 2nd defendant. This was so set out in the statement of defence filed on 9 October 1982.

There was an application for summary judgment filed by plaintiffs in September 1983 but was dismissed with costs on 18 June 1984.

There was also an application by 2nd defendant filed in March 1984 for an order that he be struck out as a party to the suit. In essence the ground in support of such application was that at the material time 2nd defendant was no longer the owner of the said motor van. Produced below are the relevant excerpts from the said affidavit:

> 5. On or before 1978, I was the registered owner of a Toyota Motor van bearing Registration No.CD 8462.
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> 6. On or before the middle of 1978, I sold the said motor van Registration No. CD 8462 to one Awang Ali bin Mohamed (NRIC No. 9835878) and I am now no longer and was not at the material time of the accident, the owner of the said motor van Registration No. CD 8462.
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> 7. I annex herewith a photostat copy of a statutory declaration affirmed by me on 18 December 1982 as an exhibit and marked "YI1".

8. In the circumstances, I am advised by my solicitors and verily believe that there can be no claim against me and that the alleged claim by the plaintiffs against me should be struck off as I was no longer the registered owner of the said motor van Registration No. CD 8462 at the material time of the accident.

The said application came up for hearing before Mohd. Eusoff Chin J who after hearing arguments from both Counsel dismissed the application with costs. No appeal was preferred against the order of dismissal.

When the trial proper came up for hearing before Abdul Malek J on 26 January 1986 Counsel for the defendants raised as a preliminary objection the same issue as was dismissed by Mohd. Eusoff Chin J earlier. Abdul Malek J also dismissed the said objection when he said in his judgment delivered on 22 February 1986:

> At the outset, Counsel for the defendants raised a preliminary objection that the 2nd defendant was not a proper party to the action as he had sold the said motor van CD 8642 some time in 1978, which was before the date of the accident. He had, however, not transferred the ownership with the RIMV despite the sale. As these same facts had in fact been averred by the 2nd defendant in his affidavit dated 21 February 1984 which was attached to his application by summons-in-chambers to strike himself off as a party to the action and since that application had been dismissed by the Court with costs on 18 June 1984, I held that the issue had been decided and ordered that the trial proceed with the 2nd defendant as a party to the proceedings despite the objection.

Despite the dismissal of the preliminary objection, the same point was apparently again pursued by the defence. This was what the learned Judge said:

> At the opening of his submissions, learned Counsel for the defendants again stated that 2nd defendant was absolved from all liability as he had dispossessed himself of ownership of the motor van before the accident but in view of the dismissal of his earlier application on 18 June 1984 on the same facts, the fact that para. 2 of his statement of defence admits that he was the registered owner of the vehicle, the fact that he did not give any evidence at the trial to rebut ownership and my earlier finding on this point at the beginning of the trial, I held that since he was still the registered owner on record, he was therefore liable.

An appeal was filed by the defendant but was dismissed by the Supreme Court. Perhaps it is interesting to note that the appellant did not appeal against the dismissal of the preliminary objection when the Court held that the 2nd defendant was the registered owner at the material time.

When the Court's award was not settled the plaintiffs then filed another suit (the present suit), this time against the insurer, Malaysian British Assurance Sdn. Bhd., claiming under s. 80(1) of Road Traffic Ordinance 1958 that the defendants are under a statutory duty to satisfy the said judgment or "in the alternative since the defendants took over the conduct of the defence in the original suit up to the appellate stage they are bound to satisfy the said judgment."

A defence was filed on 31 April 1987, raising at paras. 6 and 7 thereof the following issues allegedly to be triable:

6. The defendants aver that the 2nd defendants in Civil Suit No. 113/82, the defendants insured, had *vide* a statutory declaration dated 18 December 1982 stated that he (the insured) had sold motor van Registration No. CD 8462 on or about the middle of 1978 to one Encik Awang Ali bin Mohamad (NRIC No. 0835878).

7. Defendants further aver that by virtue of the sale and transfer of ownership to the said Encik Awang Ali bin Mohd (NRIC No. 0835878), the said policy of insurance lapsed and as such the defendants were not on risk at the material time of the accident.

On 18 April 1987 the defence filed a summons for leave to issue a third party notice against the Motor Insurers Bureau of West Malaysia alleging that by virtue of Road Traffic Ordinance 1958 the Motor Insurers Bureau owed a statutory duty to meet the judgment sum obtained against the 2nd defendant in the original suit since the policy issued to him had lapsed and therefore the defendants in the present suit were not on risk at the material time. The application was struck out on 27 January 1988 when the defendants' Counsel failed to attend Court. However, an application for reinstatement was filed and is yet to be heard.

In January 1988 the plaintiffs filed an application under O. 18 r. 19 of the Rules of the High Court to strike out the statement of defence on the grounds that "it discloses no defence at all and it is scandalous, frivolous and vexatious." The Senior Assistant Registrar on 27 January 1988 allowed the application and the defence was accordingly struck out. Against the order of the senior assistant registrar the defendants appealed to me.

The further sequence of events showed that on 31 September 1988 the defendants had paid into Court a sum of RM46,576.95 purportedly to satisfy the judgment debt. However, inspite of "notice of acceptance of money paid into Court" was filed by the plaintiffs, the plaintiffs were still unable to get the money as it was contended by the defendants that the money should not as yet be released pending the outcome of their appeal. It was not until 6 December 1988 that the award was finally settled when the plaintiffs served a writ of seizure and sale on the defendants.

In the appeal before me it was contended by the defendants that the Senior Assistant Registrar ought not to have exercised the power under O. 18 r. 19 relying on the Federal Court decision in *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor.* [1984] 1 CLJ (Rep) 211 where it was held:

> Under O. 18 r. 19 of the Rules of the High Court pleadings will only be struck out in plain and obvious cases. As long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out.

To support the defendants' contention that they were not on risk at the material time the case of *Roslan bin Abdullah v. New Zealand Insurance Co. Ltd.* [1982] 2 MLJ 324 was cited. It was argued since the ownership of the vehicle had already been transferred the policy issued by the defendants must have lapsed. In *Roslan's* case the Federal Court held:

(1) in this case, once ownership of the truck changed the insurance policy lapsed unless there was novation of the policy, which was not alleged ...

Counsel for the defendant also distinguished the case of *Nanyang Insurance Co. Ltd. v. Salbiah & Anor.* [1967] 1 MLJ 94 relied upon by the plaintiffs' Counsel before the Senior Assistant Registrar. He argued the facts in that case were not relevant and were distinguishable with the facts in the instant appeal. In that case he said "there was an agreement for sale of a car to one Abdul Karim. The agreement provided for the payment of an instalment of RM1,000 but as Abdul Karim was unable to pay this, it was orally agreed that Abdul Karim should pay this by instalments. It was the intention that the car should be lent to Abdul Karim until he paid up the instalments. The accident took place while Abdul Karim was driving the car." It was held that the owner of the car still retained an insurable interest in the car and that Abdul Karim was driving the car with the permission of the insured.

The purpose and intention of O. 18 r. 19, as can be seen, are to empower the Court in a summary manner to stay or dismiss an action or enter judgment against the defendant where the pleading discloses no reasonable cause of action or defence or it scandalous, frivolous or vexatious or it is otherwise an abuse of the process of the Court. No doubt the power to dismiss an action summarily is a drastic power and that the pleadings should be struck out only in plain and obvious cases but it may be exercised if upon the critical examination of the evidence the Court comes to the conclusion that the action is brought to defeat the course of justice by denying the execution of an earlier action - see *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1. This is so, for the Court feels that a party should be prevented from being harassed and put to expense by frivolous, vexatious, and hopeless litigation.

Apart from deriving power from the said order the Court has also an inherent and sufficient jurisdiction to deal with any matter that constitutes an abuse of its process or practice by striking out the pleadings. An illustration of how the Court dealt with such matter was shown in a case of a person who got another to bring an action which terminated unfavourably and then the person himself brought another action in respect of the same matter the Court stayed the second action as being vexatious and oppressive and the person was ordered to pay costs.

The Court's power under its inherent jurisdiction, just as under O. 18 r. 19 is discretionary.

Since the Senior Assistant Registrar did not state his reasons for allowing the plaintiffs' application and furthermore, his notes were rather brief the Court could only presume that he must have agreed with the plaintiffs' contention that the "statement of defence discloses no defence at all and it is scandalous, frivolous or vexatious."

In my view whenever it appears to the Court that the real question to be determined had already been determined by a Court of competent jurisdiction, the Court is not unjustified in dismissing the second action as being frivolous and vexatious or an abuse of its process. In so doing the Court is guided by the fact that it ought to protect a party from vexation and oppression by the continuance of proceeding which is useless and futile, thereby preventing the administration of justices from being perverted for an unjust end.

Referring to the present appeal what is more striking is that the same point had been canvassed 3 times before two different Judges and that point was rejected by them after considering the arguments advanced by the defence Counsel, incidentally a Counsel from the same firm as in the instant appeal.

It would appear that it had long been decided that it would tantamount to an abuse of the process of the Court for a litigant to file an action over an identical question which had already been decided against him even though the matter was not strictly *res judicata*. In *Stephenson v. Garrett* [1898] 1 QB 677 it was held by the English Court of Appeal that

> as a question raised in this action was identical with that decided by the County Court Judge upon the interlocutory application, and had been decided by a Court of competent jurisdiction, the action ought to be stayed as frivolous and vexatious and an abuse of the process of the Court.

A.L. Smith LJ said at p. 680:

> In my opinion the learned Judge at chambers ought to have exercised the inherent jurisdiction which he undoubtedly possessed of staying the action on the ground that it is frivolous and vexatious and an abuse of the process of the Court. I do not rest my decision upon the

> ground that the matter is *res judicata*, for I do not think it can be said that it is. I put my decision on the ground that the identical question raised in this action was raised before the County Court Judge upon an application for an order to tax the costs of the action in the County Court, and was heard and determined by him. The County Court Judge had jurisdiction to hear and determine the question upon that application, and it is perfectly clear from the evidence before him that the question there was the same as that now raised in this action ... .

and Chitty LJ had this to say:

> I am of the same opinion. I do not rest my judgment on the ground that the question is *res judicata* in the strict sense of that term. The jurisdiction which we are now exercising is the inherent jurisdiction of the Court to prevent frivolous and vexatious litigation which the Court considers to be a mere abuse of its process ...The question raised before the County Court Judge was identically the same question as that raised in the present action.

In the circumstances I am of the view that the statement of defence was rightly struck out as being frivolous and vexatious or an abuse of the Court's process. Accordingly I dismiss the appeal.

In coming to this conclusion I must say that I have not had the benefit of going through the arguments of Counsel for the plaintiffs as to this very day he has not filed his written submissions as directed by the Court and agreed to by him. In view of such failure I do not think it fair for the Court to make an order awarding costs to the plaintiffs. I therefore order that the parties are to bear their own costs.

Also found at [1990] 2 CLJ 1002